Before the
Federal Communications Commission
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Section 304 of the	)	CS Docket No. 97-80
Telecommunications Act of 1996	)	
	)	
Commercial Availability of	)	
Navigation Devices	)	

REPLY COMMENTS OF
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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March 10, 2004

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The National Cable & Telecommunications Association ("NCTA") hereby submits its reply comments in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

In this proceeding, the Commission will determine by January 1, 2005 whether the rule prohibiting cable operators from deploying set-top boxes with integrated security as of July 1, 2006 (the "integration ban") "will no longer be necessary."[1] NCTA's initial comments demonstrated that the cable-consumer electronics landscape has dramatically changed since the integration ban was adopted over five years ago.[2] Since 1998, the cable industry has committed to support the retail sale of integrated devices. The cable and consumer electronics industries

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[1] *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 7924, 7926 (2003) ("*2003 Order*"). The "integration ban," which was initially adopted by the Commission in this proceeding in 1998, mandates that cable operators cease deploying by January 1, 2005 (later extended to July 1, 2006) new navigation devices (*e.g.*, set-top boxes) that perform both security and non-security functions in a single integrated unit. The operator would have to provide cable customers with two components to receive cable service: a separate Point of Deployment security module ("POD," now called "CableCARD") and a device performing non-security functions that would operate with the POD (*i.e.,* a "Host" device), the latter of which customers could also obtain at retail.

[2] *See* NCTA Comments at 4-7. *See also* NCTA Comments, filed in CS Docket No. 97-80, at 30-32 (November 15, 2000) ("NCTA 2000 Comments").

have also entered into an historic agreement on digital cable-ready equipment that not only establishes national standards, but, through FCC action, imposes legal obligations on cable operators to modify and upgrade their systems in order to facilitate commercially available equipment. One-way digital cable-ready products are about to be introduced in the market, and negotiations on two-way digital cable-ready products are moving ahead. Meanwhile, cable operators – who are required to provide separate security modules to their customers – are gearing up to compete on the retail front with an ever stronger DBS industry.

In light of these vastly changed circumstances, the idea that a government restriction on the type of equipment a cable operator may provide to its customers is necessary to jumpstart a retail market – if ever warranted – is outdated. Indeed, as NCTA showed in its initial comments, the factual underpinnings of the integration ban are simply no longer valid.

Moreover, it is evident from the record that retention of the integration ban will be detrimental to consumers. As various Commissioners and the D.C. Circuit have acknowledged, there are potential cost advantages and other benefits of giving consumers a variety of equipment options from which to choose, including operator- or retailer-supplied integrated set-top boxes.[3] The integration ban also competitively disadvantages cable operators; DBS providers are not subject to the ban (or to the separate security requirements, for that matter) and completely control the manufacture, sale and distribution of their equipment to achieve greater efficiency and flexibility in serving their customers.

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[3] *See, e.g.*, *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Order on Reconsideration, 14 FCC Rcd 7596, 7632 (1999)("*Reconsideration Order*") (Statement of Commissioner Powell). *See also General Instrument Corp. v. FCC*, 213 F.3d 724, 731-32 (D.C. Cir. 2000).

For all of these reasons, NCTA urges the Commission to eliminate the prohibition on operator-provided integrated set-top box equipment.

While acknowledging that "great progress has been made,"[4] enhanced by increased cooperation and trust among the industries, the Consumer Electronics Association ("CEA") and the Consumer Electronics Retailers Coalition ("CERC") – the only commenters other than NCTA in this phase of the proceeding – assert in their joint comments ("CEA/CERC Comments") that the only way to establish a competitive market for the retail sale of digital cable-ready equipment is to retain the integration ban. The consumer electronics ("CE") industry would require cable operators to rely *solely* on CableCARD-enabled devices for the delivery of their services.[5] This would mean that *every* set-top box deployed after July 1, 2006 would be required to have separated security despite the fact that separate security – whose primary, if not sole, purpose is to permit portability of Host devices – provides no benefit to the vast majority of cable customers who lease their set-top boxes from the cable operator and, therefore, do not take the boxes with them when they move. Nevertheless, in the CE industry's view, the Commission must insist that both cable operator-supplied equipment and retailer-supplied equipment must rely solely on CableCARDs in order for a retail market to thrive. Without such exclusive "reliance," the CE industry argues, retailers would have no assurance that devices sold at retail will work, or function optimally, with operator-supplied CableCARDs and cable systems.

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[4] CEA/CERC Comments at 2, 6. *Id*. at 5 (acknowledging Plug and Play Agreement as a "major breakthrough"). *See also id.* at 2 (noting "progress, cooperation, and trust in other areas"); *id.* at 5 (noting "substantial progress since December 2002").

[5] As noted, the POD has now been renamed the CableCARD. The two terms are used interchangeably in this filing.

As described below, this argument has no merit. It has less to do with establishing a retail market than with ensuring that the cable industry is beholden to equipment capabilities set by the CE industry. The Plug and Play Agreement and associated Commission rules, coupled with the cable industry's business imperative to compete with DBS at retail, are already assuring, and will continue to assure, the commercial availability of equipment that works on cable systems without the need for the draconian integration ban. Moreover, by taking away operators' ability to optimize their systems for the benefit of their customers, the CE industry's approach will only stifle innovation, and, as NCTA has previously shown, increase consumer prices and limit consumer choice.

I. THE RATIONALES UNDERLYING THE BAN NO LONGER EXIST AND ATTEMPTING TO JUSTIFY THE BAN ON A THEORY OF RELIANCE HAS NO SOUND POLICY BASIS

The CE industry starts from the premise that mutual *exclusive* reliance on the POD by cable operators and retailers is an essential element to achieving a level playing field.[6] But the Commission sought to promote a "level playing field" when it adopted the ban because at the time only cable operators were able to provide integrated set-top equipment.[7] The Commission therefore adopted rules to require that both cable operators and retailers use POD-enabled equipment by a date certain.

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6 *See* CEA/CERC Comments at 5, 7, 9, 10-11.

7 *See Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Report and Order, 13 FCC Rcd 14775, 14803 (1998) ("*1998 Order*"). *See also Reconsideration Order*, 14 FCC Rcd at 7610. Indeed, CEA/CERC acknowledge this point. *See* CEA/CERC Comments at 3 (quoting the *Reconsideration Order* that stated: "Allowing MVPDs the advantage of being the only entity offering bundled boxes could adversely affect the development of this equipment market").

This rule addressed both the "level playing field" and "reliance" arguments. By requiring cable operators to rely upon POD-enabled devices, the Commission assumed operators would make certain that those devices would work on their systems and that parity in the commercial set-top box market would be achieved.

As fully described in NCTA's initial comments, both the "level playing field" and "reliance" rationales disintegrated when the cable industry committed to support integrated digital set-top boxes sold at retail and when the industries reached an agreement which set the stage for FCC-mandated national "plug and play" standards for digital cable-ready equipment and the cable systems to which they connect.[8] The "Plug and Play" Agreement established a clear path for the consumer electronics retail business to be an integral part of the introduction of new digital cable-ready equipment in the home.

The Commission then put the force of law behind the Agreement by adopting implementing rules with very specific technical standards and cable headend requirements to ensure that subscribers are able to receive digital services offered by their cable operator and fully enjoy the functionalities of their unidirectional digital cable-ready equipment.[9] These rules now assure cable customers that the CableCARDs provided to them by their cable operator will work with their Host device purchased at retail.

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[8] *See* NCTA Comments at 7-10.

[9] Under the transmission standards, digital cable systems with an activated channel capacity of 750 MHz or greater are required to adhere to certain requirements involving the digital cable network interface and the digital video service multiplex and transport system. 47 C.F.R. § 76.640; *See Implementation of Section 304 of the Telecommunications Act of 1996*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd. 20885, 20894 (2003) ("*Plug and Play Order*"). These requirements, among other things, standardize certain attributes of digital cable system transmissions, thereby facilitating the direct connection of unidirectional digital cable televisions and products to cable systems nationwide.

Last year, the Commission introduced another rationale for retaining the ban: the "evolving nature" of the ongoing negotiations between the cable and consumer electronics industries on technical specifications for bi-directional digital cable products.[10] The Commission declined to eliminate the ban, but rather extended it to July 1, 2006 on the grounds that it would have a positive influence on these negotiations.

The comments filed by both NCTA and CEA and CERC on February 19, 2004 show that both industries believe "significant progress toward a retail market" has occurred,[11] that "there has been substantial progress since December, 2002,"[12] and that the negotiations are "proceeding earnestly."[13] As requested by the FCC, the cable-CE negotiations over specifications for two-way products now include other interested industry groups. The final outcome of the talks may take more time to accommodate these interests but there is no less commitment on cable's part to arrive at an agreement on interactive cable-ready digital equipment.

In light of these developments, holding the ban over the cable industry's collective head in order to reach further inter-industry agreements is unnecessary and unwarranted, particularly at the expense of more cost-effective options for consumers.

The CE industry also argues that the integration ban is necessary because "experience teaches that reliance provides the best incentives."[14] But as NCTA demonstrated in its comments, cable operators have every incentive – as well as obligations under the *existing*

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[10] *See 2003 Order*, 18 FCC Rcd at 7925-26.

[11] NCTA Comments at 10-11. *See also* Status Report of the National Cable & Telecommunications Association, filed in CS Docket No. 97-80 (Jan. 21, 2004).

[12] CEA/CERC Comments at 5.

[13] *Id.* at 6 -7.

[14] *Id.* at 4-5.

Commission rules – to make commercially available, POD-enabled products work on their systems.[15] CEA and CERC correctly point out that "the development of both PODs and POD-reliant products stagnated until the recent 'Plug & Play' breakthrough."[16] But any such delay in the introduction of POD-enabled Host devices at retail was for a number of reasons that have nothing to do with the integration ban.

One of the major factors inhibiting the introduction of cable integrated set-top boxes or POD-enabled Host devices was the retailers' desire to use the regulatory process to enhance the profits generated through their sale of such navigation devices, such as by seeking commissions/rebates on the sale of cable set-top boxes.[17] Another hurdle was the fact that CE manufacturers had concerns with the CableLabs POD-Host Interface License Agreement ("PHILA"), in particular, its terms regarding copy protection tools and certification by CableLabs. These issues were discussed in a series of Commission and congressional meetings. These meetings, in turn, led to the landmark cable MSO-CE manufacturer Plug and Play Agreement in December 2002 and the Commission rules implementing that Agreement.

As a result of the FCC's plug and play rules, cable operators are now legally bound to support PODs and companion Hosts on digital cable systems by July 1, 2004. The recent exhibition of CableCARD-enabled products at the Consumer Electronics Show demonstrates the commitment of both the cable and consumer electronics industries to expedite the deployment of new digital cable-ready products at retail.

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[15] *See* NCTA Comments at 10-14.

[16] CEA/CERC Comments at 5.

[17] *See* NCTA 2000 Comments at 3. *See also* NCTA Reply Comments, filed in CS Docket No. 97-80, at 20-24 (Dec. 18, 2000) ("NCTA 2000 Reply Comments").

But even without the legal requirements to make sure POD-enabled devices work on their systems, cable operators have an economic incentive to do so. As NCTA has repeatedly pointed out, cable operators' core business is the sale of *services*, not the sale or lease of customer *equipment*.[18] Cable operators would prefer to take capital-intensive set-top equipment investment off their balance sheets and instead expend that capital on network and facility upgrades and other investments that will support new and more attractive services for consumers. There is nothing particularly beneficial to the industry from the business of buying, deploying and maintaining set-top boxes at a rate capped by federal law.

Moreover, in today's marketplace, cable operators are driven by another powerful economic imperative – intense competition from DBS in the marketing of video services to both current and potential cable customers. This pressure gives cable operators every incentive to maximize, rather than limit, the range of functionally-rich equipment options and distribution outlets for equipment that enables consumers to access their services. And, when cable customers acquire their cable navigation device at retail, cable operators have even more incentive to make certain that such devices work on their systems so that these customers can access all of the services they can access with the operators' set-top boxes. Otherwise, of course, cable operators will be unable to sign up these customers for additional services, or, indeed, prevent such customers from switching to DBS or other MVPD alternatives.

Cable's incentive to make retail work for the industry has become even more evident with recent announcements that DirecTV will assume complete control over the sale and distribution of all DirecTV set-top boxes used to receive its services. DirecTV is quickly

[18] *See, e.g.*, NCTA 2000 Reply Comments at 2. *See also* Ex Parte Letter from Neal Goldberg, NCTA, to Marlene Dortch, Secretary, FCC, filed in CS Docket No. 97-80 (Mar. 24, 2003).

moving toward a new proprietary hardware specification with all current DirecTV hardware being replaced by a common box with the DirecTV brand. In the face of an increasingly competitive DBS industry, with a seamless supply chain to a "vast network of retailers,"[19] cable operators will have no choice but to make certain that POD-enabled devices obtained at retail distribution outlets work on their systems if they are to meet the competition.

Cable operators have spent billions of dollars upgrading their facilities and building a platform for advanced digital services. Recovery of this massive infrastructure investment is dependent on cable operators' ability to create new products and services that will retain existing customers and attract new ones in a fiercely competitive marketplace. Again, if cable operators do not ensure that commercially-available, POD-enabled devices work on their systems, those disappointed customers can – and likely will – move to DBS.

It will be essential for cable companies operating in a highly competitive environment to retain customers who choose to purchase POD-enabled digital devices instead of leasing integrated set-top boxes. The first customer who purchases a POD-enabled cable device that does not work will mark a reversal in cable's ability to retain and attract customers that no operator would countenance.

The record in this proceeding has many examples of cable company agreements and developing relationships with leading CE manufacturers and retailers – all aimed at promoting OpenCable equipment and developing new avenues of retail distribution for digital set-top boxes

[19] DIRECTV Press Release, "DIRECTV Debuts New Hardware Strategy at CES 2004," January 8, 2004. *See also* "DIRECTV Formally Slates Distribution Restructuring," Satellite Business News Fax Update, January 9, 2004.

and other navigation devices.[20] There is no reason for the government to maintain an intrusive measure, such as the integration ban, in order to ensure what is developing naturally and irreversibly in the retail market for such equipment. None of the three rationales proferred for continuing the integration ban have any remaining validity,[21] and, as we now discuss, the ban imposes significant costs on consumers, namely increased prices, decreased choices, and reduced innovation.

II. FORCING CABLE OPERATORS TO RELY SOLELY ON SEPARATE SECURITY AND CABLECARD-ENABLED EQUIPMENT WILL HAVE ADVERSE EFFECTS ON CONSUMER CHOICE AND WILL UNNECESSARILY INCREASE COSTS

In its initial comments, NCTA showed that imposition of the ban would harm consumers who might otherwise benefit from a variety of equipment options. In advocating the elimination of the integration ban, the cable industry is not choosing one approach over another, *i.e.*, integrated box over POD-Host combination equipment. Rather, the industry is seeking to ensure that *consumers can choose* either of these two options, depending on which best fits their needs and preferences. Seen in this light, what CEA/CERC refer to as the "MSO compliance date"

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[20] *See, e.g.*, Comcast Comments, filed in CS Docket No. 97-80, at 16-17 (Mar. 28, 2003). *See also* Steve Donohue, *Hey, Shoppers, Know About Cable?*, Multichannel News (Dec. 22, 2003)(describing MSO relationships with retailers).

[21] CEA/CERC Comments at 8. In their comments, CEA/CERC's "reliance" argument has sprung a new branch. Rather than merely arguing that cable's reliance on the POD is necessary to make sure retail POD-enabled devices will work on cable systems, CEA/CERC also argue that cable will somehow leverage its use of embedded security to its advantage in the home networking arena. This example is particularly inapt. CEA/CERC have made a related argument in the broadcast flag proceeding where we will respond in detail in our March 15, 2004 reply. Suffice it to say, however, that this argument is wrong and probably based on a misunderstanding. Programming is received and decrypted either at the first POD-enabled device *or* at an integrated set-top box. From either point, we expect there to be multiple, competing home networks using wired and wireless connections and a variety of content protection techniques. A cable operator's embedded security will not have the impact CEA/CERC suggest. There is no requirement that downstream devices inside the home use *only* the conditional access tool used on a cable operator's outside plant.

would be more aptly labeled the "consumer choice reduction date" if the Commission adopted CEA/CERC's proposed retention of the integration ban.

The cable industry's ongoing commitment to develop OpenCable hardware and OCAP software ("middleware") specifications in order to enhance the functionality and portability of the POD-Host equipment option is designed to ensure that customers can walk into a consumer electronics retail store and purchase a digital television set that connects directly to any digital cable system. As we noted in our initial comments and as is evident from the record, DirecTV and EchoStar enjoy a huge marketing advantage over cable because DBS customers can move from city to city and use the same equipment.[22] Establishing portable, user-friendly set-top boxes or plug and play DTV sets allows cable operators to effectively compete head-to-head with DBS in the area of customer equipment. At the same time, some customers have no need for portability; they should not be forced into bearing additional costs when other lower cost options might be available.

And, make no mistake about it, there will be significant additional costs to the operator and the consumer from requiring every operator leased set-top box deployed after July 1, 2006 to have separated security.

There is extensive record evidence showing the potential cost advantages and other benefits that operator-leased integrated set-top boxes offer to consumers. While the costs of separated security are the subject of debate, *there is no dispute that there will be a significant additional cost* associated with adopting a universally-required, two-component POD-Host

[22] *See, e.g.*, NCTA Comments at 17-20.

combination for every cable customer.[23] When multiplied across all the set-top boxes deployed, the ban would impose hundreds of millions of dollars in additional equipment costs on consumers.[24]

This added cost does nothing to benefit consumers since the portability permitted by separate security is meaningless to consumers who lease operator-provided set-top boxes and return them to the operator when they move. And all of this would occur at the same time that DBS is cutting prices or giving customer equipment away (equipment that can be completely integrated and proprietary to the DBS operator), and regulators and others have expressed concerns over the prices consumer pay for cable.

CEA and CERC argue that, by forcing cable operators to rely solely on PODs for all of their customers, the benefits of mass production of PODs is "multifold."[25] They suggest that mass production of PODs will bring their costs down. While that is a superficially appealing argument, it ignores the fact that the cost of separate security for the operator (the cost of the interface and the POD – the latter cost which is not borne by the CE industry in making its POD-

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[23] CEA/CERC suggest that "advanced generation products" could be made available at "a fraction of the price." CEA/CERC Comments at 5. But this assertion, based on a previous CERC filing, ignores the fact that NCTA has previously shown that the CERC submission was based on an entirely inappropriate comparison to the PCMCIA-based POD. *See* Ex Parte Letter from Neal Goldberg, NCTA, to Marlene Dortch, Secretary, FCC, filed in CS Docket No. 97-80 (Jan. 7, 2003).

[24] There were 33.5 million digital set-top boxes deployed as of year-end 2003. Kagan World Media, Broadband Cable Financial Databook, 2003 at 11. While the integration ban only requires deploying POD-enabled boxes to new customers as of July 1, 2006, when existing integrated boxes are replaced they would have to be replaced by POD-enabled boxes. According to Kagan, there will be over 103 million digital set-top boxes deployed by year-end 2010, an increase of almost 50 million over the number deployed as of year-end 2006 (55.7 million) by which time the integration ban would have gone into effect. As this demonstrates, there will be a significant increase in the deployment of set-top boxes after the ban goes into effect, all of which would have to bear the extra costs to be POD-enabled.

[25] CEA/CERC Comment at 10.

enabled Host devices) will never be zero.[26] There will always be an extra cost to providing every cable customer who uses a set-top box (or multiple boxes) with a POD-enabled box (and a POD) instead of an integrated box. And those costs inevitably fall on the consumer.[27]

We hope and expect that volume production of PODs will come with volume production of one-way and two-way digital cable-ready sets. That is the way efficient markets are supposed to work. Cable operators do not force all of their customers to lease high definition set-top boxes, and the CE industry does not offer only television sets with HD receivers in them. Rather, device capabilities are matched to needs. Similarly, cable customers should have the option of obtaining set-top boxes with integrated security from their cable operators (or even from local retailers) or POD-enabled devices from their retail outlets (or even from their cable operator).

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[26] In fact, CEA/CERC suggest that, by retaining the integration ban, the cable industry becomes responsible for the "intensive work on design, development, testing, and 'debugging' of new services that require use of the POD and that, if cable doesn't do such work, it "cannot possibly receive the necessary resources or priority it requires." CEA/CERC Comments at 8. But making sure POD-enabled devices work to access cable's services is not solely cable's responsibility. As the one-way agreement made clear, cooperation is a two-way street.

[27] The CE industry also argues that continuing the integration ban would "provide[] the flexibility for MSOs to avoid embedded licensing costs that pertain to devices already in the field," CEA/CERC Comments at 10. Citing "press reports" about the development of the Sony "Passage" technology, CE suggests that, by maintaining the requirement that the cable industry use separate security, the cable industry need only simulcrypt under two encryption methods as it eventually changes out its current conditional access systems. In this regard, the CE industry misapplies a statute that *specifically forbids* the Commission from adopting rules that compromise a cable operator's conditional access security (47 USC § 629(b)), and uses it to support an argument suggesting that the industry completely change its conditional access systems. Essentially, CE is suggesting the cable industry abandon its current conditional access systems and simulcrypt using DFAST technology across its entire networks. But this proposal will not save any costs for cable operators. Even under such a system, cable operators would still have to pay licensing costs to their traditional conditional access suppliers since, under the simulcrypt methodology, traditional conditional access technology must still be used. The CE industry has just agreed with the cable industry to the POD, POD-Host Interface, cable network characteristics, and standards for transmission of encrypted digital programming. If the day came when the traditional conditional access technology was no longer used, the proposal would require replacement of all that effort and impose new headend encryption costs on cable operators. In any event, the Sony Passage technology CE cites has not been widely adopted. It hardly forms a basis for an argument that requiring operators to use POD-enabled devices after 2006 will bring costs down based upon a hypothetical change in the entire industry's approach to conditional access.

If properly engineered, POD-enabled products can promote rapid innovation without being subject to delay caused by cable operators' use of embedded security. But CE manufacturers are just beginning to roll out such devices (and CableLabs is working with others through the testing process), and we do not know how consumers will respond to those products, assuming they work as intended. As a result, even if it were true that the integration ban would result in a reduction in the cost of PODs, it is at best premature to force that production through government mandate on cable operators and customers until the marketplace votes with its dollars on its reaction to POD-enabled devices and its preference for such devices over leased integrated set-top boxes.

The risk should not fall entirely on the cable industry if CE manufacturers make POD-enabled devices that do not sell in the market. The choice should be the consumer's. Tying preservation of the rule to hypothetical cost reductions and anticipated consumer acceptance that is unknowable at this time cannot be reasoned decision-making. Nevertheless, whether or not there are cost reductions, cable operators will be bound and incented to support PODs for however many customers choose that form of device.

III. ADOPTION OF THE CE INDUSTRY ARGUMENT WOULD STIFLE INNOVATION IN DIGITAL CABLE SERVICES AND DIGITAL CABLE-READY EQUIPMENT, CONTRARY TO CONGRESS' MANDATE IN ADOPTING THE NAVIGATION DEVICE STATUTE

The CE industry has used a filing purportedly devoted to addressing whether the integration ban should remain or be eliminated to argue that development of all cable products and services must await the development and deployment of identical products and services by CE manufacturers before consumers may obtain the benefits of cable's innovations. Putting aside the fact that if such a proposal were embodied in the Commission's rules it would be directly contrary to Congress's mandate to the Commission in adopting the navigation device

statute, it is absurd on its face, requiring as it would that cable operators essentially halt investment and innovation at every step in the process until the CE industry "catches up."

In their comments, the CE industry asserts:

> Although it is a major breakthrough to be able to plug consumer electronics products directly into digital cable systems and thus obtain *most* of the programming, *every way in which a competitive product must differ from MSO-provided products retards competition*. Only by reaching *equality* of the functions and services delivered can the Phase II, interactive framework finally achieve competitive parity and success. [28]

Contrary to its premise, it is the CE industry's proposal – essentially that the cable industry cannot provide innovative products and services unless and until the CE industry does so as well (or is able to provide access to those cable services) – that plainly would retard innovation. By proposing to have the government limit all participants in the cable navigation device market to an artificial "equality of functions and services," CEA and CERC would essentially freeze digital cable-ready products and services in their tracks. One is hard pressed in this dynamic marketplace to devise a more consumer-unfriendly position.[29]

It is also important to note that the CE industry is not committing to deliver every innovation that cable might develop and deploy. While CEA/CERC decry the effort they must make to "hit[] the moving target of MSO-device functionality," had the cable industry been limited to the capabilities of consumer electronics devices over the course of its history, it would

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[28] CEA/CERC Comments at 5-6 (emphasis in original).

[29] CEA/CERC's argument is also contradicted by marketplace evidence. As noted, DBS operators are not subject to either the integration ban or the separate security requirement, yet apparently CEA/CERC do not believe that the parade of horribles they suggest regarding retarded equipment competition has occurred with respect to retail offerings of such equipment. There is no basis for assuming that a different outcome will result with respect to digital cable-ready equipment, particularly since, unlike DBS, cable operators will continue to be subject to the requirement that it support POD-enabled retail devices. Indeed, if there is any discrimination or lack of a level playing field on which the Commission should focus its attention, it is this unjustified disparity of regulatory treatment between DBS and cable.

not have been able to expand from 350 MHz to 550 MHz to 750 MHz, and beyond. It would not have launched digital tiers and on-demand programming, and it would not have incorporated such capabilities as digital video recording and electronic program guides into its services. The OpenCable process and other initiatives may yield products that are able to perform functions that have yet to be imagined. To limit such development is short-sighted and anti-consumer.

The idea that the various industry players should be locked into a scenario where there is no product differentiation, where everyone must simultaneously roll out the same functionality in all products and services, is anathema to any fast-paced, technology-driven business. Indeed, Congress anticipated the problems arising from such an approach and cautioned the Commission that when it implemented the 1996 Telecommunications Act's commercial availability provision it must "avoid actions which could have the effect of freezing or chilling the development of new technologies and services."[30] To adopt the CE "equality of functions and services" proposal would violate this congressional injunction.

Consumer electronics manufacturers would certainly never agree to such a plan within their own industry. There is no reason to impose such a straitjacket on cable or others in the digital television arena, especially where the CE industry is providing no guarantee that it will manufacture any particular products or services comparable to those developed by cable or even capable of accessing every service provided by cable.

In this regard it is important to point out that both the cable operators and CE manufacturers who signed the December 2002 Plug and Play Agreement understood that the agreement was limited to one-way devices. But now, CEA and CERC complain that the limited

[30] Telecommunications Act of 1996, Conference Report, Rep. No. 104-458, at 181 (Jan. 31, 1996).

functionality of one-way devices is "surpassed" by cable operators' leased set-top boxes.[31] Both the cable and CE industries hope that the cable-CE negotiations will ultimately result in both one-way and two-way cable services and applications that can be accessed by POD-enabled devices available at retail. But to freeze cable operator innovation and the deployment of services to consumers until those talks bear fruit is a path that no Commission seeking to advance the digital transition should take. Only by spurring development of new digital services and products by cable, broadcast, CE manufacturers and others, will consumers be incented to acquire digital products and bring the transition to an end.

CONCLUSION

For the foregoing reasons, NCTA urges the Commission to eliminate the integration ban.

Respectfully submitted,

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[31] CEA/CERC Comments at 5.